IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

WEDNESDAY, THE 20TH DECEMBER 2006 / 29TH AGRAHAYANA 1928

WP(C).No. 25841 of 2006(S)

OA.508/2005 of CENTRAL ADMINISTRATIVE TRIBUNAL,ERNAKULAM BENCH
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PETITIONERS:
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1. **THE COMMISSIONER OF CUSTOMS,**
   CUSTOMS HOUSE, COCHIN-682 009.

2. **THE UNDER SECRETARY, CUS.AD.V.,**
   GOVERNMENT OF INDIA, MINISTRY OF FINANCE,
   DEPARTMENT OF REVENUE, CENTRAL BOARD OF EXCISE &
   CUSTOMS, NEW DELHI-110 001.

3. **THE CENTRAL BOARD OF EXCISE AND CUSTOMS,**
   NORTH BLOCK, PARLIAMENT STREET, SANDAS MARG,
   NEW DELHI-110 001, REPRESENTED BY ITS
   CHAIRMAN.

4. **PRESIDENT OF INDIA &F APPELLATE**
   AUTHORITY, RASHTRAPATHY BHAVAN, NEW DELHI.

5. **UNION PUBLIC SERVICE COMMISSION**
   REPRESENTED BY ITS SECRETARY, DHOLPUR HOUSE,
   SHAJAHAN ROAD, NEW DELHI.

6. **UNION OF INDIA, REPRESENTED BY**
   SECRETARY, MINISTRY OF FINANCE, DEPARTMENT OF
   REVENUE, NEW DELHI-110 001.

BY ADV. SRI.JOHN VARGHESE, ASSISTANT SG

RESPONDENTS:

SRI.K.A.NAYAR, APPRAISER,
CUSTOMS HOUSE, COCHIN-682 009, RESIDING AT
RAGHAVANPARAMBIUL MADHOM, THERIAK LANE,
SANSKRIT COLLEGE ROAD, TRIPUNITHURA-682 301.

BY ADV. SRI.KRB.KAIMAL

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 23/11/2006, THE COURT ON 20/12/2006 DELIVERED THE FOLLOWING:

WPC NO. 25841/2006

APPENDIX

PETITIONER'S EXHIBITS

EXHIBIT P1: TRUE COPY OF O.A.NO.508/2005 OF THE CAT, ERNAKULAM BENCH, DATED 29.06.2005

EXHIBIT P2: TRUE COPY OF THE REPLY STATEMENT FILED BY THE PETITIONERS HEREIN IN O.A.NO.508/2005 DATED NIL.

EXHIBIT P3: TRUE COPY OF THE REJOINDER FILED BY THE RESPONDENT HEREIN IN O.A.NO.508/2005 DATED 18.10.2005.

EXHIBIT P4: TRUE OCPY OF THE ADDITIONAL REPLY STATEMENT FILED BY THE EPTITIONER SHEREIN IN O.A.NO.508/2005 DATED NIL.

EXHIBIT P5: TRUE COPY OF THE ORDER DATED 03.07.2006 IN O0.A.NO.508/2005 OF THE CAT, ERNAKULAM.

EXHIBIT P6: TRUE COPY OF THE ORDER DATED 11.04.2002 IN O.A.NO.48/2002 OF THE C.A.T. MUMBAI.

EXHIBIT P7: TRUE COPY OF THE CONSENT MINUTES OF THE ORDER OF THE HIGH COURT, BOMBAY DATED 27.01.2003 IN W.P.2749/2002.

EXHIBIT P8: TRUE OCPY OF THE ORDER OF THE C.A.T. MUMBAI DATED 27.05.2004 IN O.A.1062/1999.

EXHIBIT P9: TRUE COPY OF THE LETTER DATED 06.09.2006 ISSUED BY THE 1ST RESPONDENT TO THE COUNSEL IN C.A.T.

EXHIBIT P10: TRUE COPY OF M.A.NO.813/2006 FILED ON BEHALF OF THE PETITIONERS IN O.A.NO.508/2005 DATED 08.09.2006.

EXHIBIT P11: TRUE COPY OF THE ORDER OF THE CAT, ERNAKULAM IN M.A.NO.813/2006 IN O.A.NO.508/2005 DATED 15.09.2006.

//TRUE COPY//

P.S. TO JUDGE

P.R. RAMAN & K.P. BALACHANDRAN, JJ.

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W.P.(C) 25841 OF 2006

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DATED THIS, THE 20TH DAY OF DECEMBER, 2006.

J U D G M E N T

Raman, J.

The Commissioner of Customs, Customs House, Cochin and five others are the petitioners herein. The challenge is against the order passed by the Central Administrative Tribunal, Cochin Bench in O.A.508/2005, which is produced as Ext.P5 in this writ petition. Briefly stated the facts are as follows:

Disciplinary action was taken against the respondent herein under Rule 14 of the Central Civil Services Classification Control And Appeal Rules (CCS (CCA) Rules) 1965 and a memorandum was issued to him under date 1.12.1995 containing the following articles of charge.

1. that the charged officer while functioning as Appraiser in the Customs House, Mangalore during 1990 fabricated and falsified official documents and made false claim that the seizure of 250 silver bars worth Rs. 5.8 crores with an Arab Dhow "A1 Musharak" on the night of 17/18th December, 1990

was based on a specific information received by him. The charged officer with the help and connivance of Shri. D.S. Karanth, the then Additional Collector of Customs, Mangalore attempted planting a non-existing informer with the malafide intention of appropriating the reward amount. But for the subsequent inquiry,the reward amount of Rs. 87 lakhs would have been disbursed to a non-existing informer ; and

ii. that during the aforesaid period, while functioning as Appraiser, the charged officer exceeded the jurisdiction of his official work assigned to him and actively engaged in anti-smuggling work like patrolling the sea. There was a regular set up of Preventive Unit with an Asst. Collector (Preventive) and other officers to do the anti-smuggling work and as Appraiser, the charged officer was not expected to do any anti-smuggling/preventive work. The charged officer with the active help and connivance of the then Addl. Collector of Customs, acted beyond his jurisdiction and taking advantage of such acts, attempted to plant a non-existent informer for claiming reward of Rs. 87 lakhs in the seizure of 250 slabs of silver with an Arab Dhow on the night of 17/18.12.1990 near Mangalore".

2. The Inquiry Officer, pursuant to the inquiry conducted, submitted his report holding that Charge No.1 above has been proved but charge No.2 is not proved. The Disciplinary Authority, namely, the Commissioner of Customs, Cochin, by his order dated 10.5.2000 disagreed with the finding of the Inquiry Officer that charge No.2 was not proved. A notice was

issued to the charged Officer along with the copy of the report of Inquiry and the reasons of the Disciplinary Authority to disagree with the above said report. The Disciplinary Authority, after considering the application submitted by the delinquent, imposed a penalty of reduction to a lower stage in the time scale of pay for a specified period, with a further direction as to whether or not the Government servant will earn increments of pay during the period of such reduction and whether on the expiry of such period, the reduction will or will not have the effect of postponing the future increments of his pay and accordingly passed an order as follows:

> "The pay of Shri. K. Achuthan Nayar, Apparaiser, Custom House, Cochin be reduced from Rs. 8100/- in the time scale of pay of Rs. 6500-200-10500 to the minimum in the time scale of Rs. 6500/- for a period of one year with effect from the date of this order. Shri. K. Achuthan Nayar will not earn any increment of pay during the said period. On expiry of the said period, the reduction will not have the effect of postponing future increments of his pay."

3. Another employ, who was a co-delinquent, was also proceeded along with the respondent herein and charged on 7.8. 1995. The substance of the charge against him was that he colluded with the respondent and

actively helped him in fabricating and falsifying the records by making a false claim of seizure of smuggled silver bars worth Rs. 8.5 crores which was on the basis of a specific information received by the respondent and helped him in planting a non-existing informer with the mala fide intention of appropriating the award money of Rs. 87 lakhs. A separate inquiry was conducted and the disciplinary authority imposed a penalty of reduction to the lower post and re-designated him as Deputy Commissioner. The said employee challenged the order of the Disciplinary Authority before the Bombay Bench of the Tribunal by filing O.A. 1062/1999 and also preferred a review under Rule 29A of CCS (CCA) Rules, 1965, against the order of the Disciplinary Authority. The said O.A. was disposed of by order dated 27.2.2001 directing the respondents therein to dispose of the review petition after giving him a personal hearing within four months. In the case of the respondent herein he filed an appeal against imposition of charge before the President under Rule 24 of the CCS(CCA) Rules, 1965 seeking to set aside the order of the disciplinary authority and to grant him reliefs including monetary and departmental promotions which were due to him from time to time; but denied solely on account of the proceedings initiated against him. That appeal was disposed of by order dated 15.6.2005 after a

period of five years. While the aforesaid appeal was pending, the currency of penalty imposed by the disciplinary authority itself expired and his pay was re-fixed from the same date as per order dated 14.5.2001. He was also granted financial up-gradation under the ACP Scheme with effect from 9.8.1999 and his pay was fixed under FR 22(1)(a)(1). It was thereafter that a show cause notice dated 20.12.2001 was issued to the respondent proposing to review the order dated 10.5.2000 under the provisions of Rule 27(2) of the CCS (CCA) Rules, 1965 and to enhance the penalty on consideration of the appeal. The respondent was given an opportunity to submit his explanation as to why penalty imposed on him by the original order dated 10.5.2000 by the Commissioner of Customs shall not be revised under Rule 27 (2) of CCS (CCA) Rules and enhance the penalty by way of consideration of his appeal. The relevant portion of the notice is as extracted below:

> "AND WHEREAS the President has examined the Appeal filed by Shri. K.A. Nayar, Appraiser and the advise of the UPSC carefully. It is observed that the I.O., the Disciplinary Authority and the UPSC have unequivocally observed that the Article 1 of the Charge as proved ie. Shri. Nayar with the help and connivance of Shri. D.S. Karanth, Addl. Collector tried to fabricate and falsify official records by planing a non-existing informer to appropriate a reward of Rs. 87 lakhs for a

chance seizure of silver bars worth Rs. 5.8 crores. Further, the IO had held Article II ie., exceeding of jurisdiction by Shri. Nayar and engaging in anti-smuggling work for planting fake informer to claim the said reward, as "not proved". However, the Disciplinary Authority issued Show Cause Notice to CO in disagreement with the findings of IP vis-a-vis Art.II of the charge and gave detailed reasoning in the order-in-Original as to how the said charge is established against CO. However, the Commission while agreeing with IO has disagreed with the findings of the Disciplinary Authority with regard to the element (i) of the Art.Kll ie., taking advantage of his role of anti smuggling work, he attempted to plant non-existent informer to claim reward of Rs. 87 lakhs and has held the same as "not proved". However, the other element of Art.ll has been observed by the Commission as established. Definitely, the proven elements of charge as per the findings of Disciplinary authority are grave enough to warrant imposition of deterrent penalty. Equally, the Commission has also observed that there is ample evidence to prove the sinister design of the Appellant to fabricate and falsify official documents to claim prize money of Rs. 87 lakhs. The collusion of the Appellant with Shri. D.S. Karanth, Addl. Collector in the entire episode to appropriate the reward money has also been proved to the hilt. In the case of Shri. D.S. Karanth, Addl. Collector, the penalty of reduction in rank has already been imposed on him. The disciplinary authority though had made a detailed examination of the case while coming to the conclusion that Art.l and ll as proved, had failed to gave any extenuating circumstances to show leniency on C.O. excepting giving reason of long-drawn proceedings, mental agony of CO and financial and career loss. It is observed in this regard that there was never any deliberate attempt to delay the proceedings and when it is not so, the other losses are only bit natural. But the fact remains that a grave

> offence has been committed by the CO and the same is established on the basis of oral and documentary evidence. Hence there is no room for any leniency to be shown to the CO. Rather, the grave offence calls for a deterrent penalty commensurate with the offence committed by the appellant and also to maintain uniformity of penalty in the cases of delinquent officers involved in this case.
>
> AND WHEREAS the President being the Competent Authority to revise a penalty imposed by the disciplinary authority for enhancement by way of consideration of appeal in terms of Rule 27(2) of CCS (CCA) Rules, 1965, has ordered to revise the penalty imposed vide Order-in-Original dated 10.5.2000 in this case."

4. The respondent moved an application as O.A. 208/2002 before the Tribunal seeking a direction to furnish certain relevant documents, which was eventually allowed directing the petitioners herein to furnish the required documents and also extended the time for submitting the reply. In the reply eventually filed, which was produced as Annexure 10 before the Tribunal, it was prayed that the appeal be allowed appreciating the mitigating evidence and facts submitted by him. Though O.A. 494/04 was subsequently filed by the respondent herein against the apprehended termination of his service, the Tribunal did not interfere at that stage as final orders in appeal was not yet passed; but directed the petitioners herein to

dispose of the appeal filed by the respondent in the light of the reply given by him. Subsequently, on 15.6.2005 the appellate authority modified the order of punishment imposed on the respondent and substituted the punishment of dismissal from service. Challenging the said order, the respondent preferred the present O.A. before the Tribunal inter alia contending that Rule 27(2) of the CCS (CCA) Rules provides for a reasonable opportunity of making a representation against the proposed penalty and in terms the said rule contemplates that the appellate authority has to first of all formulate the proposal to impose a particular penalty as listed in Rule 11 which is atleast one higher than the penalty already imposed by the disciplinary authority and inform the same to the delinquent and to afford him sufficient opportunity to make his representation; but in Annexure 8 show cause notice there is no mention of any proposed penalty sought to be imposed on him and hence the notice itself is vitiated and unsustainable in the eye of law, that the said order of his dismissal from service amounts to double jeopardy as he has already suffered punishment/penalty imposed on him by the disciplinary authority, that for a period of 15 years he has been denied all service benefits including promotion and annual increments, that after completion of

punishment period and after having suffered punishment in full, he was granted his next increment and pay fixation and the appeal itself has become infructuous and making it alive by invoking powers under Rule 27 (2) of the CCS (CCA) Rules is in violation of the constitutional provisions contained in Article 20(2) of the Constitution of India, that the co-delinquent against whom proceedings were initiated and who was also found guilty and punishment awarded was subsequently stayed by the Bombay Bench of the Tribunal and hence he did not undergo any punishment and had got all due promotions. The proceedings by the respondents therein is contended to be a clear case of discrimination and according to him, the appellate authority failed to appreciate the evidence in the correct perspective.

5. The tribunal, by its order impugned in this writ petition, found that the dismissal of the respondent herein from service was vitiated. According to the tribunal, as per Rule 27(2) of the CCS (CCA) Rules 1965, it was obligatory on the part of the appellate authority to afford the respondent an opportunity of making a representation against the proposed penalty and such an opportunity for making a representation is to be by issuing a show cause notice proposing to enhance the penalty to one of the

penalties specified in clause (v) to (ix) of Rule 11. In other words, the appellate authority has to specify which of the five penalties listed in the aforesaid rule, he proposes to impose upon the Government Servant and this is the specific requirement of Rule 27(2)(iii) of the CCS (CCA) Rules.

6. Though it was contended on behalf of the authorities that issuance of a notice to show cause as to why the penalty imposed by the disciplinary authority should not be revised by way of enhancement is sufficient requirement as per the Rules, the tribunal did not accept this contention . In this connection, it has referred to Article 311 (2) of the Constitution, before and after amendment, and the changes brought out by such amendment. The clause as it stood prior to amendment was considered by the apex Court in **Khem Chand v. Union of India (AIR 1958 SC 300)** and after referring to the said decision and also the decision in **Union of India v. Tulsiram Patel** (1985) 3 SCC 398) it went on to hold that even though Article 311(2) was amended subsequently, Rule 27 of the CCS (CCA) Rules as is in force are in para materia with the provisions contained in Article 311(2) by its amendment by the 42nd Amendment Act, 1976. According to the Tribunal, the show case notice issued in this case, without mentioning the particular punishment proposed to be imposed, is in

violation of the said Rule. The tribunal also held that the delinquent having suffered punishment before the final orders were passed in the appeal, a further punishment is oppose to Article 22 of the Constitution of India. In the result, the O.A. was allowed with a direction to reinstate the delinquent with all consequential benefits, which order is impugned in this writ petition.

7. Therefore, the main question that arises for consideration in this writ petition is whether the non mentioning of the particular punishment proposed to be imposed, in the show cause notice caused prejudice to the delinquent and thereby denied a reasonable opportunity to submit his representation against the same and whether Rule 27 of the CCS (CCA) Rules contemplates such a requirement in law and if so, whether the absence of mentioning of a particular punishment sought to be imposed, in the show cause notice has vitiated the proceedings? However, before considering the main issue as above, we may consider the other grounds on which the O.A. has been allowed by the Tribunal and to what extent such grounds are sustainable in law.

8. In this regard, two other grounds on which the order enhancing punishment by the appellate authority was set aside, are: (i) that the

delinquent has suffered punishment during the pendency of the appeal and hence to impose a punishment of dismissal from service after he has suffered the original punishment imposed on him amounts to double punishment. It was held in this connection that the show cause notice by the appellate authority itself was issued one and a half years after the appeal has been preferred by the Government servant and final order was passed after five years and the currency of the order of the disciplinary authority expired much before the show cause notice was issued and no reason was stated for the inordinate delay in issuing the show cause notice. It was held that great prejudice has been caused to the delinquent warranting interference to find that the above finding does not appear to be correct.

9. As a matter of fact, no specific period is mentioned within which the final orders are required to be passed by the statutory rules. Only after the show cause notice was issued and before filing the reply thereto, the delinquent had approached the Tribunal for a direction to furnish certain documents so as to enable him to submit his reply and the Tribunal had passed an order and extended the period and it was thereafter that the reply was submitted after obtaining the documents. Further, the mere fact that there was some delay in passing final orders after consideration of the

reply by the appellate authority in the factual situation cannot be said to have caused any prejudice when the petitioner admittedly continued in service and enjoying the benefits all these time which is to his advantage. A penalty imposing a larger punishment requires consideration of the materials on record and the legal contentions raised. The delay, in such circumstances, in passing final orders by itself cannot be said to have vitiated the proceedings especially in the absence of any provisions prescribing any time limit within which the appeal has to be disposed of. Therefore, we do not think that the Tribunal was justified in holding that the delay in passing final orders, after the explanation was received, has caused any prejudice to the delinquent nor can it be said that it is in violation of any statutory rules and vitiating the proceedings. This finding is accordingly vacated.

10. Equally so is the ground of double punishment as a vitiating factor as stated by the Tribunal. It is the trite law that merely because of the sufferance of a punishment pending appeal filed by the respondent and in the absence of any interim order staying the operation of the original order imposing punishment by the appellate authority and thereby the delinquent employee suffered the punishment by itself is not a reason to

hold that there is double punishment imposed on him by enhancing of the punishment later by the appellate authority. As per order dated 15.6.2005 the appellate authority has imposed the punishment of dismissal from service modifying the order of original authority imposing punishment of reduction of pay. In other words, punishment of dismissal imposed by the appellate authority is in substitution of the order of punishment issued by the original authority and thus takes effect from the very day on which the original order has come into force. If the delinquent is liable to be dismissed, necessarily it cannot be said that he had suffered any double punishment. Hence for this reason also, it cannot be said that the order passed by the appellate authority is vitiated.

11. The other ground on which the order is stated to be vitiated is that the co-delinquent was not actually punished as the whole proceeding has got abated by the final orders passed within the time allowed by the Tribunal. This is shown to be factually incorrect. Ext.P8 order passed by the Tribunal (Mumbai Bench) in 2004 clearly shows that the O.A. 1062/1999 filed by the co-delinquent was dismissed. Further, the charges as levelled against the delinquent in the present case and those against the co-delinquent are not identical. The punishment to be meted out, therefore,

depends upon the actual charge that is levelled against the concerned delinquent and his involvement in the act pertaining to which the disciplinary action is taken. In so far as it has not been shown based on materials on record that the charges were identical as against both the delinquents even an allegation of discrimination cannot be successfully proved. However, there is no serious dispute that the other delinquent employee was also meted out with the punishment as imposed. In such circumstances, the ground of discrimination is not available to vitiate the proceedings.

12. Coming to the main issue as to whether a particular punishment is to be proposed in the show cause notice issued and whether in the absence thereof the proceedings are vitiated, is to be considered. Rule 27 (2) of the CCS (CCA) Rules reads thus:

> (2) In the case of an appeal against an order imposing any of the penalties specified in Rule 11 or enhancing any penalty imposed under the said rules, the Appellate Authority shall consider:--
>
> (a) whether the procedure laid down in these rules has been complied with and if not, whether such non-compliance has resulted in the violation of any provisions of the Constitution of India or in the failure of justice;
>
> (b) whether the findings of the Disciplinary Authority are warranted by the evidence on the record; and

(c) whether the penalty or the enhanced penalty imposed is adequate, inadequate or severe;

and pass orders --

(i) confirming, enhancing, reducing, or setting aside the penalty; or

(ii) remitting the case to the authority which imposed or enhanced the penalty or to any other authority with such direction as it may deem fit in the circumstances of these cases:

provided that --

(i) the Commission shall be consulted in all cases where such consultation is necessary:

(ii) if such enhanced penalty which the Appellate Authority proposes to impose is one of the penalties specified in Clauses (v) to (ix) of Rule 11 and an inquiry under Rule 14 has not already been held in the case, the Appellate Authority shall, subject to the provisions of Rule 19, itself hold such inquiry or direct that such inquiry be held in accordance with the provisions of Rule 14 and thereafter, on a consideration of the proceedings of such inquiry and make such orders as it may deem fit;

(iii) if the enhanced penalty which the Appellate Authority proposes to impose is one of the penalties specified in Clauses (v) to (ix) of Rule 11 and an enquiry under Rule 14 has been held in the case, the Appellate Authority shall make such orders as it may deem fit after the appellant has been given a reasonable opportunity of making a representation against the proposed penalty; and

(iv) no order imposing an enhanced penalty shall be made in

> any other case unless the appellant has been given a reasonable opportunity, as far as may be in accordance with the provisions of Rule 16, of making a representation against such enhanced penalty."
> Rule 27(2)(iii) as noticed above, was actually brought in by substitution by Notification No. 11012/8/94-Estt. (A) dated 2nd January, 1996. In the present case, admittedly, the notice of show cause issued by the appellate authority proposing to enhance the penalty produced as Annexure A before the Tribunal did not mention the particular penalty proposed to be inflicted.

13. According to the petitioner, the only provision for enhancement of the penalty is as per Rule 11 and show cause notice is to be given to the delinquent officer so as to enable him to submit his representation. It does not say that the appellate authority has to specify which one of the five penalties listed in Clause (v) to (ix) he proposes to impose. It is contended that the finding of the Tribunal that the appellate authority has to specify any one of the five penalties listed in Clauses (v) to (ix) of Rule 11 is not correct and sustainable. According to him, the finding of the Tribunal that 'the third and fourth proviso to Rule 27(2) is a condition precedent that the appellate authority shall arrive at a tentative proposal as regards the penalty proposed to be enhanced and it shall inform such proposed penalty to the Government servant and give him a reasonable opportunity of making a representation against it and that till

that stage the proposed penalty is merely provisional, is unfounded and unsustainable.

14. On the other hand, the learned counsel Sri. K.R.B. Kaimal, appearing on behalf of the respondent would support the order of the Tribunal and contends that in the absence of proposing a particular punishment, no effective opportunity could be said to have been afforded to the delinquent in terms of the rule and therefore, the punishment imposed is vitiated. According to him, the requirement of mentioning of the particular punishment proposed to be inflicted is embodied in the third proviso to Rule 27(2) of the CCS(CCA) Rules. It is also his contention that the provision contained in Article 311 (2) prior to its amendment which is similarly worded and have the interpretation of Art. 311(2) as it stood then may have a bearing. He also placed reliance on some of the decisions of the apex court to support his argument. Article 311 prior to its constitutional amendment brought out by 48th Amendment, reads as follows:

> 311. (1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

> (2) No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him.
>
> xxxxxxxx xxxxxxx xxxxxxx xxxx"

15. By the 48th Amendment of the Constitution, the requirement of a show cause notice at the time of inflicting a punishment though was done away with, the rule as far as the present case is concerned, based on which the appellate authority proposed to enhance the punishment, in specific terms, obliges the appellate authority to issue a show cause notice if the enhanced penalty which the appellate authority proposes to inflict under Clauses (v) to (ix) of Rule 11 is dismissal from service - the maximum punishment that could be imposed. However, it is admitted that the show cause notice so issued did not mention the particular punishment proposed to be imposed. While considering the provisions of Article 311(2) as read above, the apex court in **P. Joseph John v. State of Travancore-Cochin** (1955 SC 160) held thus:

> "As regards the question whether the petitioner was given reasonable opportunity of showing cause against the action proposed to be taken in regard to him, the legal position in that respect and the nature of opportunity to be granted was stated by the Privy

> Council in the case of 'High Commissioner for India v. I.M. Lall', (A(R 1948 PC 121 (A), and it was held that when a stage is reached when definite conclusions have been come to as to the charges, and the actual punishment to follow is provisionally determined on, that the statute gives the civil servant an opportunity for which sub-section (3) of Section 240 of the Government of India Act, 1935 (which corresponds to Article 311) makes provision, and that at that stage a reasonable opportunity has to be afforded to the civil servant concerned."

16. In that case, however, as could be seen from para 4 of the decision that the communication issued to the petitioner therein did contain a proposal to remove him from service from the date on which he was placed under suspension. In these circumstances, it was held that it satisfies the requirement of Article 311(2). In **State of Madhya Pradesh v. Ram Ratan (** 1980 Supp.SCC 198) the apex court had again occasion to consider the scope and ambit of Article 311(2) as it stood at the relevant time prior to its amendment in 1976. It was held in para 4 of the judgment as follows:

> "Article 311(2) as it stood at the relevant time prior to its amendment in 1976 imposed a constitutional obligation upon the punishing authority to serve a second show cause notice where it is proposed after a departmental inquiry to impose on the delinquent government servant any of the penalties referred to in Article 311 so as to give a reasonable opportunity of making representation on the penalty proposed.

Rule 15(4)(i)(b) of the 1966 Rules prescribes procedure to be followed by the disciplinary authority before imposing punishment to the effect that the concerned authority should give a notice setting the penalty proposed to be imposed on the concerned government servant calling upon him to submit within 15 days of the receipt of notice or such further time not exceeding 15 days, as may be allowed, such representation as he may wish to make on the proposed penalty on the basis of the evidence adduced during the inquiry held under Rule 14. It would thus appear that the punishing authority has in the second show cause notice to specify the punishment which it tentatively or provisionally decides upon to impose looking to the gravity of the charge which is held proved. At that stage the decision of the punishing authority is a tentative decision and in the very nature of things it must be so because an opportunity has to be given to the delinquent government servant to make a representation on the nature of penalty. This would imply that if the delinquent officer in his representation makes out a case for a lesser punishment the disciplinary authority would keep an open mind and after applying its mind to the representation made by the delinquent government servant, the authority may either confirm its earlier tentative decision or it would be open to it to award a lesser penalty than the one tentatively decided.

5. Principle of natural justice and fair play implicit in Article 311(2) and Rule 15(4)(i)(b) would require that the disciplinary authority has to take into consideration the representation made by the delinquent government servant in response to the notice which is a constitutional obligation, and if the delinquent officer is in a position to persuade by his representation, to so modulate the punishment as

would accord with the gravity of the misconduct and other mitigating or extenuating circumstances all of which may enter into the verdict of deciding upon the penalty, and consequently the disciplinary authority would be free to impose a lesser penalty than the one proposed in the second notice. This is the constitutional scheme.

6. If the view that the High Court has taken is to be accepted that the disciplinary authority must tentatively decide upon the penalty and specify the penalty in the second show cause notice and after taking into consideration the representation made by the delinquent government servant in response to the notice it can only confirm the tentative decision but cannot award a lesser punishment, the exercise of giving second show cause notice becomes self-defeating and giving of the notice inviting the representation on the question of penalty would be an exercise in futility. Such an approach would render a tentative decision as final and the rest being an empty formality. Such could not be the underlying object in enacting a constitutional mandate for the protection of government servants.

xxxxx xxxxx xxxxx xxxxxxx

9. It is thus incontrovertible that if any particular penalty is specified as tentatively proposed in the second show cause notice the disciplinary authority after taking into consideration the representation made by the delinquent government servant can award that penalty or any lesser penalty and in so doing Article 311 (2) will not be violated. In fact, this leaves open a discretion to the punishing authority which accords with reason, fair play and justice."

In that case also, it was tentatively proposed to impose a major penalty of removal from service. Therefore, it was held that it is open to impose a lesser punishment than which is tentatively proposed. However that does not arise in the present case. In **Khem Chand v. Union of Indi**a (AIR 1958 SC 300) a Constitution Bench of the Supreme Court, considered the requirement of Article 311 (2) of the Constitution of India, and as to what is reasonable opportunity and what does it include and held as follows:

> The reasonable opportunity envisaged to the Government servant by the provision contained in Art.311(2) includes :
>
> (a) an opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based:
>
> (b) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence; and finally (c) an opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the competent authority, after the enquiry is over and after applying his mind to the gravity or otherwise of the charges proved against the government servant tentatively proposes to inflict one of the three punishments and communicates the same to the government servant. "

The apex court in clear and unambiguous terms held as follows:

> "It is true that the provision does not, in terms, refer to different stages at which opportunity is to be given to the officer concerned. All that it says is that the government servant must be given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. He must not only be given an opportunity but such opportunity must be a reasonable one. In order that the opportunity to show cause against the proposed action may be regarded as a reasonable one, it is quite obviously necessary that the government servant should have the opportunity, to say, if that be his case, that he has not been guilty of any misconduct to merit any punishment at all and also that the particular punishment proposed to be given is much more drastic and severe than he deserves. Both these pleas have a direct bearing on the question of punishment and may well be put forward in showing cause against the proposed punishment.
>
> xxxxxxx xxxxx xxxxxx
>
> In addition to showing that he has not been guilty of any misconduct so as to merit any punishment, it is reasonable that he should also have an opportunity to contend that the charges proved against him do not necessarily require the particular punishment proposed to be meted out to him. He may say, for instance, that although he has been guilty of some misconduct it is not of such a character as to merit the extreme punishment of dismissal or even of removal or reduction in rank and that any of the lesser punishments ought to be sufficient in his case."

This decision was followed later in **Union of India v. K. Rajappa Menon (**AIR 1970 SC 748) also.

17. In the light of the above decisions of the apex court, it can be seen that in order to have a reasonable opportunity to make a representation against the enhancement of the punishment proposed and in terms of the third proviso to Rule 27 (2) of the CCS (CCA) Rules, there cannot be any doubt that such a show cause notice proposing to enhance the punishment necessarily should contain the particular punishment proposed to be inflicted. It is true that though a capital punishment may be proposed as a tentative punishment, it may be open to the authority to actually impose a lesser punishment than what was proposed. But at that stage, a further notice may not be required to be issued. But in this case, the delinquent was imposed a punishment of dismissal without proposing that particular punishment in the show cause notice so issued. In the circumstances, the view taken by the Tribunal that the order is vitiated as the show cause notice was not issued in terms of the specific rules as referred to above is correct and no interference is called for. Subject to the above observation, the writ petition is dismissed.

We, however, make it clear that it will be open to the appellate authority to issue a fresh show cause notice containing all the requirements of law as stated above. However, such proceedings should be completed

within a period of four months. In case no final orders are passed by the appellate authority within the aforesaid period of four months the order of the Tribunal as confirmed by this Court, shall be implemented forthwith.

P.R. RAMAN,
(JUDGE)

K.P. BALACHANDRAN,
(JUDGE)

knc/-